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October 15, 2007

VIA ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Ex Parte Presentation***; Exclusive Service Contracts for the Provision of Video Services
in Multiple Dwelling Units; MB Docket No. 07-51

Dear Ms. Dortch:

The enclosed letter was transmitted to Amy Blankenship, Legal Advisor to Commissioner Tate, on October 12, 2007. Kindly direct any questions regarding this matter to my attention.

Respectfully submitted,

/s/ Daniel K. Alvarez
Daniel K. Alvarez
Counsel for Comcast Corporation

Attachments

October 12, 2007

VIA ELECTRONIC FILING

Ms. Amy Blankenship
Legal Advisor to Commissioner Deborah Taylor Tate
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Ex Parte Presentation***; Exclusive Service Contracts for the Provision of Video Services
in Multiple Dwelling Units; MB Docket No. 07-51

Dear Ms. Blankenship:

During and subsequent to our meeting of October 10, 2007, you posed several questions regarding Comcast's experience with MDU exclusive agreements. We hope that the following addresses your questions.

First, you requested information about the numbers of MDUs that are subject to exclusive agreements and the term of those agreements. We advised that the state of the record on that is thin. The Commission specifically sought comment about that,¹ but those who assert there is a problem that requires government intervention to solve came forward with merely anecdotal and insubstantial evidence.² On the other hand, the Real Access Alliance ("RAA") has advised the Commission that, based on its research, "no more than half of the apartment buildings in the country are subject to *some form of exclusive agreement*"³ (i.e., including exclusive marketing, exclusive access, exclusive wiring, bulk rate agreements, etc.), and that "practices vary from company to company and property to property, based on a range of factors."⁴ The number of MDUs that Comcast serves with exclusive access contracts is very small relative to the total number of MDUs that Comcast serves. Notably,

¹ See *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Notice of Proposed Rulemaking, 22 FCC Rcd 5935 ¶ 7 (2007).

² For further discussion, see Reply Comments of Comcast, MB Dkt 07-51, at 8-9 (filed Aug. 1, 2007).

³ Comments of Real Access Alliance, MB Dkt. 07-51, at 12 (filed July 2, 2007) ("RAA Comments") (emphasis added).

⁴ *Id.* at 11.

Comcast already serves numerous MDUs in states that already have mandatory access statutes -- including Virginia, Massachusetts, New Jersey, Illinois, Pennsylvania, and Florida. As Comcast mentioned in its comments, each of these states (and others) has considered the issue of mandatory access, and they have reached varying conclusions regarding the manner in which state law should be applied.⁵ In these states, and consistent with applicable law, Comcast already cannot enter into most exclusive access agreements. The result is that the Commission is in the same position as it was in 2003, when it determined “the record does not support a prohibition on exclusive contracts for video services, nor a time limit, in the nature of a cap, for such contracts.”⁶

With respect to the terms of existing exclusive contracts, RAA has noted that “the length of exclusive agreements typically ranges between 5 and 10 years.”⁷ Comcast agrees that this is probably the case. In its experience, Comcast’s agreements, exclusive or otherwise, to provide video services in MDUs very seldom run longer than 10 years. As these agreements involve often complex negotiations in which capital is invested and compensation paid up front, their terms will vary depending upon the economics of the particular transaction. As a result, the Commission is in a situation that is very similar to its situation in 2003, where it looked closely at this issue and found that “the current record is insufficient to justify government-sanctioned caps of any length.”⁸ The Commission expressly recognized that service providers make investments in reliance on exclusivity that require some period to recover but found the record bereft of “critical cost recovery information,” noting, among other things, “that *specific cost recovery periods may vary* and are tied to the unique attributes of MDU buildings, as well as MVPD providers.”⁹ Therefore, the Commission found, “based on the record, we cannot discern the ‘correct’ length” of any cap.¹⁰

⁵ Comments of Comcast, MB Dkt. 07-51, at 21-23 (filed July 2, 2007). Perhaps the only thing that all these state mandatory access laws do have in common is that *none* of them abrogated or prohibited the enforcement of existing contracts.

⁶ See *In the Matter of Telecommunications Services Inside Wiring and Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 ¶ 71 (2003) (“MDU Order”).

⁷ Reply Comments of Real Access Alliance, MB Dkt. 07-51, at 9 (filed Aug. 1, 2007).

⁸ MDU Order ¶ 70.

⁹ *Id.* (emphasis added).

¹⁰ *Id.* ¶ 71. Notably, when the Commission decided to prohibit exclusive contracts for telecommunications services in commercial multi-tenant buildings in the *Competitive Networks* order, it refrained from abrogating existing contracts. This, despite the fact that such exclusive contracts had no countervailing consumer benefits and that commercial tenants are often locked into their leases for much longer than residential tenants. See *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983 ¶ 36 (2000). See also Comcast Reply Comments at 13 n. 35 (explaining why the Commission has less reason to abrogate existing contracts in this proceeding than it did in the *Competitive Networks* proceeding).

Further, with respect to so-called “perpetual contacts,” the Commission read the record to indicate that “perpetual contracts are neither prevalent nor currently being entered into.”¹¹ Not one of the property owners surveyed by commenters in that proceeding had entered into such an arrangement in the preceding five years.¹² There is nothing in the current record to suggest that has changed.

With respect to another question you asked, exclusive contracts that specify a period of years are not “perpetual contracts” in disguise. Property owners and building managers do convert their properties from exclusive access to non-exclusive access, just as they sometimes convert their properties from non-exclusive to exclusive. Upon expiration of existing agreements, exclusive or otherwise, property owners can and do go to the marketplace and negotiate with multiple parties in an attempt to secure additional benefits for their residents (e.g., internal wiring and system upgrades, better discounts for consumers, etc.). Comcast’s experience is that it is *very rare* that a property owner does not take advantage of a renewal period to negotiate for a new video service agreement with multiple MVPDs willing to serve the property. None of these underlying facts has changed since 2003.

What has changed since 2003 is that many MVPDs are providing voice service, in addition to the broadband Internet and traditional cable services, to consumers in MDUs. Sometimes the MVPD does so directly; sometimes it partners with others to do so. To the extent that it is technically feasible, Comcast makes voice and broadband Internet service available to residents in any MDU in which it has an exclusive arrangement for video services, although typically the voice and broadband Internet services are not provided on an exclusive basis. Further, as RAA noted in its comments, “property owners rely on [exclusive] agreements to ensure that their residents have access to high-quality and reliable voice, video, and data services.”¹³ It may be the case that some smaller MVPDs have not reached a point, technically or financially, where they can offer these services, but, even if this is true, it is not reason enough for the Commission to intervene in a fully functioning marketplace -- such MVPDs can often partner with other providers to offer these services.

If anything, the Commission’s laudable desire to ensure that residents of MDUs have meaningful competition in voice, video, and broadband Internet services should lead the Commission to refrain from prohibiting exclusives. As MVPDs of all shapes and sizes have made clear to the Commission, their ability to offer any of these services to MDU residents hinges on their ability to secure some form of exclusivity.¹⁴ Further, as Comcast explained in its comments, a rule prohibiting exclusive agreements could combine with the existing cable inside wiring rules to create the unintended consequence of removing, for many MDU residents, their *only* alternative to the ILECs for

¹¹ MDU Order ¶ 76.

¹² *Id.*

¹³ RAA Comments at 1.

¹⁴ See, e.g., Letter of Mr. Paul Savoldelli, CEO, DirecPath, to Ms. Marlene Dortch, Secretary, Federal Communications Commission, MB Dkt. 07-51 (filed Aug. 6, 2007).

broadband Internet or voice services.¹⁵ This is surely not a situation the Commission desires, but it may well be a situation the Commission creates.

As in 2003, the Commission is confronted with a record in which “parties have identified both pro-competitive and anti-competitive aspects of exclusive contracts” and the Commission “cannot state, based on the record, that exclusive contracts are predominantly anti-competitive.”¹⁶ As before, the Commission has no need to determine whether it has legal authority to prohibit such contracts, much less the authority to abrogate existing contracts.

Thank you, again, for your time and attention to this matter. Please let us know if you have any further questions.

Respectfully submitted,

/s/ Daniel K. Alvarez
Daniel K. Alvarez
Counsel for Comcast Corporation

¹⁵ See Comcast Comments at 6-10.

¹⁶ See MDU Order ¶ 76.